Supreme Court, U.S.
FILED
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No. 01-151

IN THE

Supreme Court of the United States

BARNES-JEWISH HOSPITAL, et al.,

Petitioners,

-and-

MARK D. ROBERTS, et al.,

Petitioners,

v.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT

BRIEF IN OPPOSITION FOR PLAINTIFFS-RESPONDENTS

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PARTIES TO THE PROCEEDING

The plaintiffs-respondents are Robert A. Ring, Michael F. Kickham, Sr., 6024 Washington Avenue, Inc., Champ Spring Company, Kickham Boiler and Engineering, Inc., Viking Lodge and Restaurant, Inc., and Apartment Exchange, Inc. They were listed at page ii of the petition.

Rule 29.6 Statement

None of the corporate respondents has a parent company and no publicly held company owns 10% or more of the stock of any such respondent.

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STATEMENT OF THE CASE

The Statement in the petition does not present a full and fair statement of the relevant facts. Plaintiffs' obligation to point out misstatements made in the petition (see Rule 15.2) requires an extensive statement of supporting facts.[1]

1. Background of this litigation

Defendant MSD is a political subdivision of Missouri, created pursuant to Article VI, § 30 of the Missouri constitution. As of 1992, MSD served approximately 420,000 accounts in the City of St. Louis and St. Louis County, including single and multi-family dwellings and commercial and industrial customers. In 1992 MSD adopted Ordinance No. 8657 (Pl. Ex. 13), increasing its sewer service charges for one fiscal year only, from July 1, 1992, to June 30, 1993. This ordinance increased the charges for the single-family residential customer by four dollars per month, or a total of $48 for the period of the ordinance. For the multi-family unit customer, such as apartments and condominiums, the increase was three dollars per month, a total of $36 for the year. The increases for the commercial/industrial customers varied, because their individual charges fluctuated, depending on volume of water consumed and other factors. These are

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1. Plaintiffs-respondents are collectively referred to as "plaintiffs." Defendant-respondent The Metropolitan St. Louis Sewer District is referred to as "defendant" or "MSD." The corporate petitioners are referred to as "the Barnes-Jewish petitioners." The individual petitioners are referred to as "the Roberts petitioners."

The petition is cited as "Pet. __." The appendix to the petition is cited as "Pet. A- __." The appendix to this brief in opposition is cited as "p. A- __, *infra*." The transcript of the hearing in the trial court on November 1, 1999, is cited as "Tr. __." The remainder of the record on appeal, known in Missouri as the Legal File, is cited as "LF __."

the increased charges which are the subject of this lengthy litigation. They were expected to generate revenues of approximately $39,000,000 in that year.

In June of 1992 Lewis Green, class counsel here, filed suit to enjoin the increased charges on behalf of three individual customers. The injunction was denied, and the increased charges went into effect. On December 21, 1993, the Supreme Court of Missouri reversed that decision, holding the increased charges unconstitutional, in violation of Article X, § 22(a) of the Missouri Constitution. Pet. A-44. *Beatty v. MSD,* 867 S.W.2d 217 (Mo.banc 1993), Pet. A-14. Except for delinquent customers, the unconstitutional charges had already been collected.

On remand those three plaintiffs obtained from the circuit court an order that MSD credit the accounts of all 420,000 rate-payers with the amounts unlawfully collected pursuant to Ordinance No. 8657. The Supreme Court of Missouri ruled that the circuit court had properly ordered restitution for the three named plaintiffs, but that restitution for the remainder of the 420,000 customers could not be obtained in that case because it was not a class action pursuant to Rule 52.08, Missouri Supreme Court Rules. *Beatty v. MSD,* 914 S.W.2d 791, 795-96 (Mo.banc Dec. 19, 1995). Further, the Supreme Court stated that "class proceedings certified pursuant to subsections (b)(1) or (b)(2) . . . are probably preferable in this type of a lawsuit. Certification under subsection (b)(1) or (b)(2) does not require notification nor does it allow class members to opt out." 914 S.W.2d at 795-96 n.3.

The *Beatty* litigation is closed, except for the pending motion for costs, including attorney's fees, costs, and expenses.

2. This case

Two days after the Supreme Court ruling in *Beatty*, on December 21, 1995, plaintiffs-respondents filed this *Ring* case in the circuit court of the City of St. Louis as a class action suit for restitution, to recover for the other customers the unlawful charges paid by them. LF 1. These plaintiffs include at least one person who paid the single-unit residential charge, at least one who paid the multi-unit residential charge, and three who paid the non-residential charges. LF 16-17, Tr. 24, 47-48, 141-42. They therefore include persons who paid each of the three kinds of charges levied by Ordinance No. 8657. Pl. Ex. 13.

MSD denied liability, and pleaded eight affirmative defenses. The circuit court dismissed the first amended petition on one ground, ignoring the other defenses. The Missouri Supreme Court, considering only the defense of sovereign immunity, reversed, holding that Article X, § 23 of the Missouri Constitution (Pet. A-44-45) waived the sovereign immunity defense to a suit for refund. However, the Court said nothing about the applicability of that defense to plaintiffs' claim for interest. *Ring v. MSD*, 969 S.W.2d 716, 719 (Mo.banc 1998). The Court added:

> As we suggested in *Beatty III*, plaintiffs are not precluded from bringing a Rule 52.08 class action if such a class action is appropriate under the specific facts of the case.

969 S.W.2d at 719. The Court further stated that, even if the trial court found a class action appropriate, the class members might not receive the total amount of the overcharges which they sought:

> We are also confident that if the trial court determines that a class action is appropriate and

> that the plaintiffs' claims entitle them to prevail on the merits, it will fashion a remedy that will acknowledge both the taxpayers' rights under article X, section 22(a), and the important obligations MSD bears under the environmental laws of the nation and state.

969 S.W.2d at 719.

On remand, an amended motion for class certification (Pl. Ex. 8), was heard and submitted, but no ruling was issued prior to execution of the settlement agreement. Meanwhile, plaintiffs filed their second amended petition. Pl. Ex. 6, LF 16. MSD filed its answer, denying liability and again asserting eight affirmative defenses. Pl. Ex. 7, LF 23. In addition to failure to state a claim, MSD's defenses included the statute of limitations, laches, validity of the non-residential charges, set-off, sovereign immunity, unavailability of the class action procedure for tax refunds, and a claim that it would be inequitable to allow recovery because the fees unlawfully collected were expended for the benefit of the class members to fulfill MSD's obligations under its governing charter and under "the environmental laws of the nation and the state." LF 28-29.

3. The settlement

In 1999 the parties agreed to mediate the controversy. LF 288. Two prominent attorneys were chosen as mediators. After two days of mediation, the parties agreed on a settlement. The settlement agreement was signed and filed with the circuit court on August 27, 1999. LF 31. Its provisions may be briefly summarized here, as follows.

1. MSD will create a Settlement Fund of $30,140,000. LF 39.

2. Notices were to be, and have been, mailed and published, in an effort to locate all eligible class members who can be located. LF 39-43, 108-25. The sufficiency of notice is not challenged here.

3. After all valid claims have been approved, the total amount of overcharges claimed will be determined. LF 44-45. The entire Settlement Fund (after attorneys' fees and other expenses) will then be paid out to the identified eligible claimants, in proportion to the amount of unconstitutional overcharges they paid. LF 45-46.

4. From the Settlement Fund the Court was to award plaintiffs' counsel an amount (not to exceed 15% of the Settlement Fund) to reimburse them for expenses, and to compensate them for fees, for the litigation of both the *Beatty* case and the *Ring* case, over a period of more than seven years (now nine years). LF 50-52.

On August 27, 1999, the Circuit Court scheduled a hearing on approval of the settlement for November 1, 1999, and provided that any person who objected to the settlement could file objections on or before October 25, 1999. LF 86.

Also on August 27, copies of the settlement agreement with all attached exhibits were delivered to Mr. Johnson, counsel for the Barnes-Jewish petitioners, who had been actively interested in the litigation since his participation in 1993 as counsel for the amici curiae in the *Beatty* case. Tr. 17. On October 25, 1999, the Barnes-Jewish petitioners filed objections. LF 262, 263. They claim that they are class members who paid the unlawful sewer service charges of 1992-93. Also on October 25, 1999, the Roberts petitioners filed objections (LF 173), together with a motion to intervene, arguing that intervention was necessary "to preserve their

rights on appeal." LF 258, 261. They also claim that they are class members who paid the unlawful sewer service charges of 1992-93. Only two other persons filed objections.

4. The settlement hearing, November 1, 1999

On November 1, 1999, the circuit court conducted a lengthy hearing. Tr. 6. The Court heard argument on pending motions, including the motion to intervene. The Court heard statements on behalf of all persons who desired to speak in support of or in opposition to the settlement. Tr. 10-13, 15-22. Counsel for the Barnes-Jewish petitioners and counsel for the Roberts petitioners each spoke at length. Tr. 148, 152. Both were invited by the Court to present testimony and evidence. The Barnes-Jewish petitioners submitted an affidavit of a paralegal. Tr. 18. The Roberts petitioners offered no testimony or evidence. Tr. 9. Their motion to intervene being unsworn, there is no testimony or evidence in the record to show that these three alleged individuals exist, or that any of them paid MSD's unlawful 1992-93 overcharges. If they did, they presumably paid a residential overcharge, a maximum of $36 or $48 per household.

With the consent of plaintiffs, both groups of petitioners were permitted to participate fully in the hearing as if they were parties. Tr. 9, 17-18. Counsel for each group cross-examined all witnesses extensively, and presented further argument (Tr. 148, 152, 160-61), but declined to present any testimony or evidence.

Three of the named plaintiffs testified concerning the fairness of the settlement and their representation of the class. Tr. 23, 47, 141. Class counsel testified at length concerning the fairness of the settlement. Tr. 55-109. He believed the settlement to be better than fair and reasonable. Tr. 63.

He explained that MSD's defenses presented significant risks. Tr. 63-69. Specifically, he expressed concern that the Missouri Supreme Court's statement that the trial judge is to fashion a remedy taking into account MSD's obligations under the environmental laws is vague and open-ended, seemingly giving the trial court instructions to reduce or adjust the recovery by some indeterminate amount. Tr. 67-68. MSD has argued that every penny MSD receives is spent in carrying out MSD's responsibilities under the Clean Water Act. Tr. 68-69; Ex. 22. The Clean Water Act requires MSD not only to build new secondary treatment plants but also to operate and maintain the system every day. Tr. 69. In MSD's view, everything MSD spends is arguably spent in furtherance of obligations under the Clean Water Act. *Id.*

Class counsel explained that to the extent that class members cannot be found, they cannot be paid a refund, so no court could order that MSD make restitution to them. Tr. 72, 85, 96. Already approximately 145,000 of the 420,000 class members had moved, or died, or somehow become impossible to locate. Tr. 84-85. Every day plaintiffs are losing approximately 58 class members, 21,000 class members per year. Tr. 75, 85; Ex. 21. These persons will not receive any refund. Tr. 75.

At the time of the hearing, timely claims were still being presented, so it was not possible to count the total number of claims precisely. Tr. 84. Further, the dollar amount of the commercial and industrial claims, which would have to be individually calculated, had not been determined. Tr. 84. Accordingly, it was not then possible to ascertain the exact amount that each claimant would receive. Tr. 84. That amount would range between 88.6% and 92.4% of the unlawful overcharge. Tr. 86-87; Pl. Ex. 21. Class counsel's best

estimate was that each claimant would receive 90.4% of the unlawful overcharge.[2] Tr. 73, 107; Pl. Ex. 21.

Two expert witnesses, including a former circuit judge and a former City Counselor for the City of St. Louis who has prosecuted three or four class action suits involving Missouri's Hancock Amendment, testified that the settlement is fair and reasonable and in the best interest of the class plaintiffs. Tr. 114, Ex. 25, Tr. 122, 125-27, 131.

Counsel for MSD asserted that MSD believes the settlement is fair, reasonable and adequate, and MSD supports it. Tr. 145. He explained that MSD had strong defenses to this case. Tr. 145-47.

Counsel for the Roberts petitioners applauded class counsel's efforts, pointing out that class counsel brought MSD to the table after six or seven years, going to the Supreme Court three times. Tr. 148-149. He then asserted that the settlement was not fair and reasonable. Tr. 149. He felt that the class representatives did not adequately represent the class because they agreed with the settlement and thus did not properly represent the persons within the class. Tr. 161. Primarily, his clients were concerned about the value of the settlement. *Id.*

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2. Petitioners liken this settlement to "inadequate settlements . . . in which the only winners are the attorneys for the representative class plaintiff." Pet. 7. On the contrary, the winners are the class members, especially the Barnes-Jewish petitioners, who claim they paid more than $741,310 in unlawful overcharges. LF 313; Tr. 155. Without having contributed a thin dime to this nine-year litigation, they will receive a bonanza of more than 90% of those overcharges — more than $667,170. If any of the Roberts petitioners exists, and actually paid a $48 overcharge, he will receive a refund of approximately $43.39.

Counsel for the Barnes-Jewish petitioners agreed that class counsel had done an outstanding job. Tr. 154. He stated that his clients had paid more than $740,000 in the unlawful tax. Tr. 155.

5. Post-hearing activity

On November 22, 1999, three weeks after the settlement hearing, the Barnes-Jewish petitioners filed a motion to intervene, arguing that intervention was necessary "to preserve their rights on appeal." LF 311, 314.

On December 27, 1999, the trial court entered its Order and Final Judgment. Pet. A-32. After summarizing the hearing, the Court emphasized that "the possibility of continued litigation and the probability of additional appeals were reinforced" by the Supreme Court ruling in this case that the trial court should "fashion a remedy that will acknowledge . . . the important obligations that MSD bears under the environmental laws." Pet. A-33. The Court overruled all remaining motions, including the motions to intervene. Pet. A-33.

The Court noted that "35% of the class members have already been lost . . . [and] will receive no refund." Pet. A-34. The Court noted that "[a]dditional delays and further litigation" would increase that number. Pet. A-34. The Court certified the class under subsections (a) and (b)(1)(A), (b)(1)(B), and (b)(2) of Rule 52.08 of the Missouri Rules of Civil Procedure. Pet. A-36. The class consists of all MSD customers who were charged for wastewater sewer services pursuant to the schedule set forth in Ordinance No. 8657. Pet. A-36.

The Court found that the settlement "is fair, reasonable, and adequate, is in the best interest of the Settlement Class,

and should be approved." Pet. A-37-38. In support of that ruling the Court noted that this litigation began in 1992 and "could possibly continue for several more years. The issues are complex and unprecedented. There already have been several trips to the appellate courts. This settlement will end this litigation once and for all." Pet. A-38. The Court "analyzed the probability of plaintiffs' success on the merits, and has determined that the settlement is a fair and reasonable compromise of these disputed issues." Pet. A-38. The Court pointed out that the settlement provides for "a substantial percentage refund" to each class member, and "there is no reason to believe that the class would be reasonably likely to achieve a more favorable result by continuing with the litigation." Pet. A-38. Further, the Court observed that the settlement is supported by the named plaintiffs, counsel for the class and counsel for MSD. A group of some of MSD's largest customers has expressed its support. Objections were received "from only ten or so class members, out of some 420,000." The Court found this to be "persuasive evidence of the fairness of the settlement." Pet. A-38.

The Court granted the application for an award of attorney's fees and costs, awarding 15% of the Settlement Fund. Pet. A-42. As provided in the Settlement Stipulation, the Court found that this award is for all services performed, results obtained, and costs incurred in connection with this case and the predecessor *Beatty* case. Pet. A-42. The Court further ordered that its judgment approving the settlement, and the Settlement Stipulation, are not to be construed to be an admission by MSD of any liability or wrongdoing whatsoever. Pet. A-43.

6. Appeal

The Barnes-Jewish petitioners appealed to the Missouri Court of Appeals, Eastern District, as did the Roberts petitioners. LF 340, 341. Each group asserted that it was

appealing both the denial of intervention and the approval of the settlement. Pet. A-5. Both plaintiffs and MSD moved to dismiss the appeals from the approval of the settlement on the ground that petitioners, having been denied intervention, were not parties to the principal case. Pet. A-5-6. The motions were taken with the case. The issue was again briefed in the briefs on appeal. In their reply brief petitioners vigorously argued that they had standing to appeal the merits of the trial court's approval of the settlement, without even hinting that they might find some constitutional basis to support their argument. Pet. A-107-09. After oral argument, the Court of Appeals sustained the motions to dismiss for lack of standing, because the motions to intervene had been denied. Pet. A-8.

The Court of Appeals also affirmed the denial of intervention, pointing out that "[w]hile there is a difference of opinion as to the amount [petitioners] should receive in the settlement, their interests are identical" to the interests of the class representatives. Pet. A-9. The Court further ruled that the settlement was fair and reasonable. Pet. A-11. The Court rejected petitioners' claim that they are entitled to 100% recovery of the overcharge plus interest and attorney's fees, pointing out that MSD pleaded several defenses including statute of limitations, laches, and sovereign immunity to the interest claim; that the Missouri Supreme Court had already ruled that a remedy should recognize "the important obligations MSD bears under the environmental laws of the nation and the state"; that 145,000 class members have been lost and an additional 21,000 are lost each year; that each qualified class member would receive approximately 90% of the overcharges; that the litigation over these overcharges had already lasted over seven years, including three appeals to the court of appeals and three to the Missouri Supreme Court; and that the trial court properly took into account the delays and risks of further

protracted litigation over MSD's defenses. Pet. A-11-12. All of these factors supported the determination that petitioners were adequately represented, and the denial of intervention. Pet. A-13.

While the Court of Appeals looked to federal precedent "for guidance" (Pet. A-8), the Court did not consider any federal question.

The Court of Appeals denied petitioners' motions for rehearing or transfer to the Missouri Supreme Court. Pet. A-29.

On April 24, 2001, the Missouri Supreme Court, without opinion, denied petitioners' applications for transfer. Pet. A-1.

REASONS FOR DENYING THE WRIT

1. The decision of the Missouri Supreme Court presents nothing for this Court to review

Petitioners designate the ruling of the Missouri Supreme Court as the judgment which they are asking this Court to review pursuant to 28 U.S.C. § 1257(a). Pet. 9, 11. This designation is confirmed by the cover of the petition, which states that petitioners are requesting a writ of certiorari be issued to the Supreme Court of Missouri. That Court's denial of transfer (Pet. A-1) presents nothing for this Court to review. All that the Supreme Court of Missouri did was to decline to review the case.

With certain specific exceptions not applicable here, the jurisdiction of the Supreme Court of Missouri is discretionary, much like the certiorari jurisdiction of this Court. Upon application, the Supreme Court of Missouri can

order an appeal transferred from the lower court to the Supreme Court because of the general interest or importance of the question involved in the case, or for the purpose of re-examining the existing law, or pursuant to Supreme Court Rule. Art. V, § 10, Mo. Const., p. A-1, *infra*. See Rule 83.04, Mo.R.Civ.P., stating that the Supreme Court may transfer a case from a lower court to the Supreme Court on application, for either of the reasons specified in the Constitution, or for the reason that the opinion filed is contrary to a previous decision of an appellate court of Missouri. Page A-2, *infra*. When, as in this case, the Supreme Court of Missouri denies a motion for transfer, like this Court in denying a petition for certiorari, the Court is not reviewing the merits of the appeal, but is simply declining to take jurisdiction.

If the writ were granted, it would have to be dismissed for lack of jurisdiction when the nature of the decision below becomes clear. *E.g.*, *Western Union v. Priester*, 276 U.S. 252, 258 (1928). *Cf. Van Huffel v. Harkelrode*, 284 U.S. 225, 230-31 (1931); *R. J. Reynolds Tobacco Co. v. Durham County, North Carolina*, 479 U.S. 130, 139 (1986); *Randall v. Board of Commissioners of Tippecanoe County*, 261 U.S. 252 (1923). The petition for writ of certiorari should be denied.

Petitioners could have asked this Court to review the judgment of the Court of Appeals by seeking a writ issued to that Court. *E.g.*, *Western Union, supra*, 276 U.S. at 258; *Chicago & E. Ill. R.R. Co. v. Industrial Commission of Illinois*, 284 U.S. 296, 297-98 (1932); *Adam v. Saenger*, 303 U.S. 59, 61 (1938). Treating the petition as such a request, there are numerous reasons why the request should be denied.

2. Petitioners have failed to show that their Questions Presented were timely and properly raised

Rule 14.1(g)(i) of the Rules of this Court requires that petitioners, in their Statement of the Case, specify when their Questions Presented were raised and the method of raising

them, to show that the questions were timely and properly raised. The Missouri Court of Appeals did not address the "due process" questions which petitioners seek to present here. Accordingly, as to each of those questions, petitioners must shoulder "their burden of showing that the issue was properly presented to that court." *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). In their Statement, petitioners have made no effort to show that either of their two Questions was timely and properly raised, although some effort is made in the Argument.

The first Question (constitutional right to appeal)

The First Question defies analysis. There is no "Rule 58.08(b)(3)" in the Missouri Rules of Civil Procedure. Perhaps petitioners intended to invoke Rule 52.08(b)(3), cited at Pet. 13. However, that rule has nothing to do with this case. This class was certified under Rule 52.08(a) and (b)(1)(A), (b)(1)(B), and (b)(2). Pet. A-36.

As set forth by petitioners, the first Question was never raised in any court, even untimely and improperly, and is not presented by the record in this case. A question that was extensively briefed, argued, and decided was whether a class member who objects to the amount of the settlement, whose motion to intervene has been denied, and who is therefore not a party to the underlying litigation, has standing to appeal the approval of the settlement in the Missouri courts under § 512.020, R.S. Mo., which limits the right of appeal to "any party to a suit . . ." Pet. A-45. Apparently petitioners now would like to argue that § 512.020 denies them due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution. The discussion below assumes that this is the first Question presented.

At page 9 petitioners claim that they raised the first Question in their application for transfer filed in the Missouri Supreme Court, citing page A-52 attached to the petition. The cited page is a portion of the application for transfer filed in the Supreme Court of Missouri. See Pet. A-47. Of course that is much too late to raise the question. *E.g., El Paso & S.W.R.R. v. Eichel,* 226 U.S. 590, 598 (1913). Even if petitioners claimed that they had raised this question in their petition for rehearing in the court of appeals, that would be much too late to give the court of appeals "a fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb,* 451 U.S. 493, 501 (1981). See *Adams v. Robertson, supra,* 520 U.S. at 89 n.3; *Rotary International, supra,* 481 U.S. at 550.

Petitioners assert (p. 9): "Procedural due process could not have been raised earlier, because the Missouri rule governing the issue had not yet been annunciated." This appears to be an effort to bring this petition under the umbrella of the "surprise" exception to the rule: "The federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. Georgia,* 295 U.S. 441, 444 (1935). That effort fails for two reasons. First, petitioners do not claim that they raised this issue in their petition for rehearing in the court of appeals. Second, the ruling of the court of appeals could easily have been anticipated. Section 512.020, R.S.Mo., limits the right of appeal to a "party." Pet. A-45. This limitation has been strictly enforced. Persons who have been denied intervention have consistently been held not to be parties, and therefore to lack standing to appeal. *E.g., State ex rel. Strohm v. Board of Zoning Adjustment,* 869 S.W.2d 302, 303 (Mo. App. 1994); *Lewis v. Barnes Hospital,* 685 S.W.2d 591, 594 (Mo. App. 1985); *Carondelet Savings and Loan Ass'n v. Boyer,* 645 S.W.2d 24, 25-26 (Mo. App. 1982). Surely it could have been

anticipated that these rulings would be followed. Indeed, both groups of petitioners anticipated that likelihood when they filed their motions to intervene in the trial court, arguing that intervention was necessary "to preserve their rights on appeal." LF 261, 314. Petitioners acknowledged this purpose in their opening brief on appeal. See Pet. A-64, A-90 n.7.

Immediately after the appeal was filed, plaintiffs and defendant filed separate motions to dismiss the appeal, pointing out that these nonparty petitioners had no standing to appeal the merits of the trial court's ruling approving the settlement. The motions were taken with the case. Pet. A-5-6, A-8. The parties briefed the standing issue fully in their briefs before oral argument. The Barnes-Jewish petitioners briefed the standing issue extensively in their reply brief on appeal, without even hinting that they might find some provision of the Constitution to support their argument. Pet. A-95, A-107-09. Clearly the ruling sustaining the motions to dismiss could have been, and was, anticipated. If petitioners had any real "due process" argument to present, the time to present it was before the case was argued and submitted, at least as early as the reply brief, not long after the appeal was decided.

In short, petitioners have utterly failed to meet the requirements of this Court's rule.

The second Question (constitutionally guaranteed right to better representation)

In their second Question, petitioners claim that their representation by the class representatives was so inadequate that it violated the Fourteenth Amendment of the United States Constitution, because the plaintiff class settled for less money than petitioners claim is appropriate. At page 12

petitioners claim that this "due process" claim was presented at pages A-51, A-90, and A-117 attached to the petition. The short answer to that claim is that not one of those pages even refers to the United States Constitution.

In summary, petitioners fail to show that either Question was timely and properly raised. For this reason alone the petition for certiorari should be denied.

3. The Questions Presented are devoid of merit

Neither of the Questions Presented presents any issue of substance for this Court to review.

The first Question (constitutional right to appeal)

Petitioners apparently claim that they had a constitutional right to appeal the judgment approving the settlement, even though they were not parties to that litigation. This first Question is not only frivolous, it is preposterous. The United States Constitution assures that each state will have a republican form of government. Art. IV, § 4. But it does not regulate the judicial system of the state.

> We have made it quite clear that it is a matter for each State to decide how to structure its judicial system.

Johnson v. Fankell, 520 U.S. 911, 922 n.13 (1997). "[T]he right of review in an appellate court is purely a matter of state concern." *Kohl v. Lehlback,* 160 U.S. 293, 299 (1895). A claim that the United States Constitution guarantees an unfettered right to appeal in the state judicial system presents no substantial federal question. *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74, 79, 80 (1930).[3]

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3. The United States Constitution does not even guarantee a right to appeal in the federal judicial system. *E.g., Palmore v. United States,* 411 U.S. 389, 401 (1973).

In Missouri it is well settled that the "right of appeal is purely statutory and when the statutes do not give such right, no right exists." *Speck v. Union Electric Co.*, 731 S.W.2d 16, 20 (Mo.banc 1987). Accordingly, the Missouri General Assembly was well within its constitutional rights in limiting the right of appeal in the Missouri judicial system to "parties."[4]

Petitioners assert (p. 8) that the federal courts of appeals have disagreed over the right of a class member to appeal the approval of a settlement of a class action in the federal court system, without intervening and becoming a party. That may be correct, but it is irrelevant. The cases cited by petitioners on pages 8 and 9 are based upon the Federal Rules of Civil Procedure, not upon the United States Constitution. None of the standing rulings even cites the Constitution. Indeed, the Tenth Circuit emphasized that its ruling on standing was "founded upon prudential, rather than constitutional concerns." *Gottlieb v. Wiles*, 11 F.3d 1004, 1013 (10th Cir. 1993). Further, those federal courts were not confronted by § 512.020, R.S. Mo., limiting appeals to "parties." Pet. A-45. None of those federal courts even considered who has standing to appeal in the Missouri courts.[5]

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4. This limitation is found in § 512.020, R.S.Mo., Pet. A-45, not Missouri Civil Rule 52.08, which petitioners contend denies them due process of law (Pet. 11). The Missouri Constitution expressly provides that Supreme Court "rules shall not change . . . the right of appeal." Article V, Section 5. No rule denied petitioners the right to appeal.

5. Petitioners urge that the petition be granted because "[t]he split among the circuits should be resolved." P. 12. This Court has already done its part to guide the federal courts. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988): "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment

(Cont'd)

Missouri, of course, does provide a procedure for an interested observer to become a party, and thus gain a right to appeal, by intervening. Rule 52.12, Mo.R.Civ.P. However, these petitioners failed in multiple respects to establish their right to intervene. See opinion of Court of Appeals at Pet. A-8 and footnote 3.

The second Question (constitutionally guaranteed right to better representation)

This Question is also without substance. Petitioners concede that the alleged inadequacy of representation by the class is based entirely upon a difference in opinion respecting the value of the case: petitioners claim that they should get more money than they will get pursuant to this settlement. Petition p. i, p. 7, p. 13. The fact that petitioners want more money cannot support a finding of inadequate representation, for two reasons. First, a disagreement over the amount of recovery is not sufficient to show inadequate representation. *E.g.*, *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987):

(Cont'd)
is well settled . . . We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." See *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd sub nom. California Public Employees' Retirement System v. Felzen*, 525 U.S. 315 (1999). The "split" is greatly exaggerated; petitioners cite only one post-*Marino* decision allegedly supporting standing of a nonparty, in an opinion which does not even cite *Marino*, holding that a prior decision of the Third Circuit was "binding on this panel." *Carlough v. Amchem Products, Inc.*, 5 F.3d 707, 714 (3d Cir. 1993). The 1977 Ninth Circuit decision cited by petitioners at page 8 has been effectively overruled by *Powers v. Eichen*, 229 F.3d 1249, 1254, 1255-56 (9th Cir. 2000). In any event, this petition presents no opportunity to resolve any "split" over the right to appeal in the federal system; petitioners were attempting to appeal in the Missouri courts.

> An applicant for intervention fails to meet his burden of demonstrating inadequate representation "when no collusion is shown between the representatives and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty." . . . A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation.

Cf. Jenkins by Jenkins v. State of Missouri, 78 F.3d 1270, 1275 (8th Cir. 1996); *In re General Tire & Rubber Co. Securities Litigation,* 726 F.2d 1075, 1087 (6th Cir. 1984), *cert. denied sub nom. Schreiber v. Gencorp, Inc.,* 469 U.S. 858. Second, if such a disagreement were relevant, a review of the evidence would show that petitioners' view of the value of the case is unsound, and that the Question set forth by petitioners is not supported by the record.

If this Court were going to explore the detailed facts bearing upon plaintiffs' decision to settle the litigation for $30,140,000, this Court would have to undertake an extensive, fact-specific inquiry. Some of the relevant facts are misstated in the Question Presented and throughout the petition. Most of the relevant facts are not represented there at all. Limitations of space preclude a full review of the relevant facts here, but plaintiffs will note some of the highlights below.

Petitioners falsely assert, in their second Question Presented and in the body of the petition, (1) that "liability was res judicata," (2) that "the undisputed damages were approximately $38,300,000," and (3) that the claim for interest (5% or 9% ?) was a sure thing ("waived . . . interest,"

"essentially res judicata"). Petition pp. i, 7, 13. The following pages will consider each of these three misrepresentations separately.

A. "Liability was res judicata"

When this case was first filed, the trial court upheld the defense of sovereign immunity, and dismissed the entire case. Considering only the sovereign immunity issue, the Supreme Court of Missouri reversed. *Ring v. Metropolitan St. Louis Sewer District,* 969 S.W.2d 716, 719 (Mo.banc 1998). The Court held that "article X, section 23 [of the Missouri Constitution], operates as a waiver of sovereign immunity and permits taxpayers to seek a refund . . ." The Supreme Court of Missouri remanded "for consideration of the merits of plaintiffs' petition." 969 S.W.2d at 719. Thus, the defense of sovereign immunity was laid to rest, insofar as plaintiffs seek a refund, although the availability of that defense to a claim for interest was not considered by the Missouri Supreme Court. Defendants' other affirmative defenses remained to be tried.

Several of those other affirmative defenses presented serious risks for the plaintiffs. For example, defendant MSD pleaded that recovery was barred because the money unlawfully collected had already been spent for plaintiffs' benefit; that MSD's charges were in fact lawful; and that plaintiffs are barred by laches. LF 28-30. A recent decision suggests that the defense of laches barred any recovery. *Koehr v. Emmons,* No. ED 78152, decided by the Missouri Court of Appeals, Eastern District, on July 24, 2001, holding that an action to recover overcharges paid to a governmental entity in violation of Article X, Section 22 of the Missouri Constitution must be brought before the charges become payable. The rationale of that case would bar recovery here,

because this class action was not filed until approximately two and one half years after the last of the sewer district overcharges was payable.

In summary, the assertion that "liability was res judicata" is specious. The various defenses remain to be litigated. Had this case proceeded to trial, plaintiffs could very well have lost altogether, on several grounds.

B. "Undisputed damages were $38,300,000"

Petitioners know very well that this claim, also, is false, for at least two reasons which were the subject of considerable testimony and evidence at the hearing on approval of the settlement.

i. No class member can recover the overcharge paid by some other class member

This is an action for restitution, not damages. Plaintiffs sought a judgment requiring defendant MSD to refund to each class member who comes forward to claim his refund the amount of his overcharge, with interest.

Petitioners falsely assert that the Net Settlement Fund (after payment of attorneys' fees and expenses) "would be distributed among MSD's 420,000 customers" (p. 5). 420,000 is the approximate number of customers who were overcharged in the period from July 1, 1992 to June 30, 1993. At the time of the settlement hearing (November 1, 1999), after a computer search of MSD's records and mailing and publication of notice and claim forms, the parties were still unable to locate approximately 145,000, or 34.5%, of those MSD customers. Tr. 84-85. (The remaining 275,000 customers are still disappearing at the rate of 21,000 per year. Tr. 75, 85) The Missouri Supreme Court has never ruled,

and plaintiffs' petition does not even claim, that the 275,000 customers who can be found (including petitioners) are entitled to recover the overcharges paid by those who cannot be found. Accordingly, as of the date of the settlement hearing, the maximum principal recovery claimed by plaintiffs was the amount of overcharges paid by the 275,000 class members who could be located. While that amount was not precisely known at that date, it would have been something in the neighborhood of $25,086,500 ($38,300,000 less .345 x $38,300,000).[6] Plaintiffs obtained more than that amount by way of the settlement, although the amount that plaintiffs were seeking to recover was shrinking every day, as more class members disappeared.

In summary, the statement that "undisputed damages were $38,300,000" is bogus. Not only was liability energetically disputed, but also the maximum restitution which plaintiffs could even ask for at the time of the settlement was somewhere in the vicinity of $25,000,000.

ii. The Missouri Supreme Court has invited a substantial discount from the face value of plaintiffs' claims

In remanding this case for trial, the Supreme Court ruled that this action for restitution was an action in equity, and invited the trial court, if plaintiffs should prevail on the merits, to "fashion a remedy that will acknowledge . . . the important obligations MSD bears under the environmental laws of the nation and state." *Ring v. Metropolitan St. Louis Sewer District, supra,* 969 S.W. 2d at 719. In short, the Missouri Supreme Court virtually mandated that the face

6. This assumes (inaccurately) that the value of the lost claims proportionately matches the value of the total claims. For more detailed estimates, see plaintiffs' exhibit 21. After allowance for attorneys' fees and expenses, each class member who can be located will receive approximately 89% to 92% of the overcharge he paid. Pl. Ex. 21.

amount of any claims on which plaintiffs might prevail be discounted by an indeterminate amount. This ruling of the Supreme Court was emphasized by both the trial court (Pet. A-33) and the Court of Appeals (Pet. A-11). This ruling obviously has a major impact on any effort to place a dollar value on plaintiffs' claims. It also has a major impact in considering the probability of further appeals. See Pet. A-33.[7]

In summary, petitioners' assertion that "undisputed damages were $38,300,000," and that plaintiffs' right to that amount of principal is *res judicata*, is false.

C. "[B]etween $17 million and $37 million in prejudgment interest . . . was res judicata"

Plaintiffs, of course, sought to recover not only the amount of the overcharges, but also interest on the use of the money over the years. Plaintiffs realized from the beginning that this claim presented substantial difficulties. When the Missouri Supreme Court reversed the dismissal of this case, and remanded for trial, the court ruled that the defense of sovereign immunity had been waived with respect to the claims for refunds, but said nothing about claims for interest. *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716, 719 (1998).

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7. Petitioners have no objection to the amount allowed by the trial court for attorneys fees and expenses, not only in this *Ring* case but in the *Beatty* litigation also, beginning in 1992. But they object (p. 15) to that amount being paid out of the total Settlement Fund, arguing that it should be paid by the defendant in addition to the Settlement Fund, pointing to Art. X, § 23 of the Missouri Constitution (Pet. A-45). That provision authorizes an award of attorney fees and expenses "if the suit is sustained." This suit has not been "sustained"; it has been compromised and settled. The settlement agreement, incorporated in the final judgment, expressly disclaims any admission of liability on the part of defendant MSD, as does the Final Judgment. Pet. A-43.

In Missouri, as elsewhere, waivers of sovereign immunity are strictly construed. *Benoit v. Missouri Highway & Trans. Comm'n*, 33 S.W.3d 663, 673 (Mo. App. 2000). While Article X, Section 23 of the Missouri Constitution (Pet. A-44-45) has been held to be an implied waiver of sovereign immunity with respect to refund of principal overcharges, it has not been held to be an implied waiver of sovereign immunity respecting interest.

Even if the defense of sovereign immunity could be overcome, the claim for interest would be subject to all of the risks and qualifications of the claim for principal, and would be especially vulnerable to the Missouri Supreme Court's admonition to the trial court to preserve MSD's ability to fulfill "the important obligations MSD bears under the environmental laws of the nation and state." 969 S.W.2d at 719. Indeed, that admonition arguably established petitioners' suit for restitution as a suit for an unliquidated sum, rather than a liquidated overcharge, as defense counsel explained (Tr. 146-47), precluding a claim for pre-judgment interest. Petitioners' claim (p. 7) that the right to recover interest (at 5% or 9% ?) on $38,300,000 is *res judicata* is chimerical.

These three misrepresentations illustrate the nature of the second Question Presented. An inquiry into the strength of plaintiffs' claims is intensely fact-specific. Petitioners concede this, arguing (page 13) that "the settling parties failed to present substantial evidence that the significant discount of the plaintiff class' claims were [sic] justified given the strength of plaintiff's claims." On the contrary, at a six-hour hearing on November 1, 1999, plaintiffs presented extensive testimony and evidence respecting the value of their claims, and the obstacles that would lie ahead in attempting to recover them. Plaintiffs' witnesses were extensively cross-examined

by counsel for those who are petitioners here. The claims were evaluated by class counsel, and by the trial judge, and were reviewed by the court of appeals.

Petitioners have withheld most of that testimony and evidence from this Court, and have misrepresented and distorted the few matters which they did present. Consideration of the value of plaintiffs' claims, and the adequacy of the amount recovered, is an intensely factual exercise dependent upon the specific facts of this case. Review of the adequacy of representation, based on the adequacy of the amount recovered, is therefore equally fact-specific. Petitioners do not even claim (page 7), nor could they, that this factual decision of the Missouri Court of Appeals conflicts with any other decisions, involving different facts. There is no reason for this Court to embark on this unique factual exploration.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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MISSOURI CONSTITUTION, ARTICLE V, SECTION 10

Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals, or any district of the court of appeals. Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

MISSOURI SUPREME COURT RULES

Rule 83.02

A case disposed of by an opinion, memorandum decision, written order, or order of dismissal in the court of appeals may be transferred to this Court by order of a majority of the participating judges, regular and special, on their own motion or on application of a party. Transfer may be ordered because of the general interest or importance of a question involved in the case or for the purpose of reexamining existing law.

. . . .

Appendix

Rule 83.04

If an application for transfer under Rule 83.02 has been denied, the case may be transferred by order of this Court on application of a party for any of the reasons specified in Rule 83.02 or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state.

. . . .